1949

Calder Brothers Creamery Co. and The Commission of Finance of Utah v. The Industrial Commission of Utah and Charles M. James : Brief of Plaintiffs

Utah Supreme Court

F. A. Trottier; Attorney for Plaintiff;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

CALDER BROTHERS CREAMERY COMPANY, a corporation, and THE COMMISSION OF FINANCE OF UTAH, Administering The State Insurance Fund,

Plaintiffs,

vs.

THE INDUSTRIAL COMMISSION OF UTAH and CHARLES M. JAMES,

Defendants.

No. 7275

PLAINTIFFS' BRIEF

F. A. TROTTIER,
Attorney for Plaintiffs.

INDEX

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PLAINTIFFS' BRIEF

STATEMENT

Charles M. James was injured in a gas explosion which occurred on November 6, 1939, while he was in the employ of Calder Brothers Creamery Company at Vernal, Utah. The employer's workmen's compensation insurance was carried in the State Insurance Fund. Mr.

James was in the hospital for some time after the accident and was under doctor's treatment for a considerable period of time. There was no question about the accident being compensable, so the State Insurance Fund paid all of the medical and hospital bills for his treatment and paid him compensation in accordance with the provisions of the Workmen's Compensation Law in force at the time of his accident. The State Insurance Fund continued to make compensation payments to Mr. James until the summer of 1948.

The question was raised, whether Mr. James was still disabled and, consequently, whether he could be considered as "permantently and totally disabled." The Industrial Commission held a hearing at Vernal, Utah, on October 7, 1948, after having previously notified all of the parties concerned. At the commencement of the hearing the presiding commissioner stated that the hearing was being held to determine the present disability of Mr. James and to consider the matter of whether he is qualified to participate in the benefits of the Combined Injury Benefit Fund. The reason why the Combined Injury Benefit Fund could be involved in the case was because Mr. James had lost his left leg by amputation when he was fifteen years of age, which was many years before his accident in November, 1939.

On November 4, 1948, the Industrial Commission rendered its decision in which it held that Mr. James was permanently and totally disabled, although the evidence at the hearing showed that he had been working at a

steady job for about three years prior to the hearing and had been earning a regular wage of $160.00 a month.

In its decision of November 4, 1948, the Industrial Commission ordered both the State Insurance Fund and the Combined Injury Benefit Fund to pay compensation to Mr. James at the rate of $8.79 per week. On November 9, 1948, the State Insurance Fund filed with the Industrial Commission an application for rehearing, in which the Commision's attention was called to several errors contained in the decision.

On November 16, 1948, the Industrial Commission, without holding any further hearing and without giving any notices to any of the parties, issued an amended decision in which it made almost exactly the same findings and conclusions and orders as were contained in its November 4, 1948, decision, insofar as the State Insurance Fund was concerned; but in the amended decision the Industrial Commission eliminated any order for the Combined Injury Benefit Fund to make any payments to Mr. James.

On November 18, 1948, the Industrial Commission denied the application for rehearing which had been filed by the State Insurance Fund on November 9, 1948. A Writ of Certiorari was obtained from this Court on December 17, 1948, directing the Industrial Commission to send its record to this Court on or before January 6, 1949, for review, which has been done.

In the meantime, although we maintain that the

Industrial Commission did not have any authority or jurisdiction to issue its Amended Decision of November 16, 1948, we filed another application for rehearing with the Industrial Commission on December 15, 1948, so as to be on the safe side from a procedural standpoint. On December 29, 1948, the Commission attempted to grant a rehearing, but has not proceeded further in the case since sending its record to this court on January 6, 1949.

QUESTIONS FOR REVIEW

There are two main questions involved in this case. The first question is whether an injured employee can be classed as being "permanently and totally disabled," when he has not lost certain specified members of his body and has not completely lost the use of said members and he has been gainfully employed for a period of three years. The second question involves the Industrial Commission's jurisdiction and procedure relating to applications for rehearing.

ARGUMENT

POINT 1

CHARLES M. JAMES CANNOT LEGALLY BE AWARDED COMPENSATION FOR "PERMANENT TOTAL DISABILITY" FOR A PERIOD WHEN HE IS CONTINUOUSLY EMPLOYED AND EARNING SUBSTANTIAL WAGES IN THAT EMPLOYMENT.

The provision of the Workmen's Compensation Act

relating to permanent total disability, as it was in force in November, 1939, when Mr. James had the accident involved in this case, reads as follows:

Section 42-1-63.

> In cases of permanent total disability, the award shall be 60 per cent of the average weekly wages for five years from date of injury, and thereafter 45 per cent of such average weekly wages until the death of such person so totally disabled, but not to exceed a maximum of $16 per week, plus 5 per cent of such award for each dependent minor child under the age of eighteen years, up to a maximum of five such dependent minor children, and not less than $7 per week. The loss, or permanent and complete loss of use, of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of this section.

One of the most recent cases in which the Utah Supreme Court interpreted and applied the provisions of the foregoing section was *Johnson vs. Industrial Commission,* 93 Utah 493, 73 Pac. (2nd) 1308. In that case Ephraim Johnson claimed that he was permanently and totally disabled. He alleged that he was not able to do any manual labor without suffering considerable pain. The Industrial Commission awarded him 200 weeks compensation for his permanent partial disability. Mr. Johnson's attorneys then took the case to the Supreme Court, which held:

> "Plaintiff's condition does not fit into the

> classification described in the last sentence of Section 42-1-63, R. S. Utah 1933: that is, there was no permanent and complete loss or loss of use of both arms so that he would be permanently disabled as a matter of law. It was then for the commission to decide from all the facts and circumstances in evidence whether he was so disabled.
>
> * * * *
>
> The evidence does not compel a finding of total permanent disability and does support the award as made."

Another decision of this Court containing a discussion relating to permanent total disability was *Babick vs. Industrial Commission,* 91 Utah 581, 65 Pac. (2nd) 1133. Mr. Babick received an injury to his spinal cord, which caused some of the muscles of each leg to be partially paralyzed and this resulted in so much disability in the legs that he was unable to engage in his previous occupation as a miner or in any other occupation of similar character. He also stated that he was unable to remain in one position for very long without suffering pain. The various doctors who testified in the case gave their estimate of his disability varying from 50% to 75% and they were all agreed that he could not engage in mining or any occupation requiring heavy muscular labor. With these facts before it, the Supreme Court sustained the commission's denial of compensation to Babick as a permanent total disability. In giving its reasons for sustaining the commission, the Court differentiated the case from the *Caillet case,* 90 Utah 8, 58 Pac. (2nd) 760, and somewhat modified the Caillet decision. On the last

page of the Court's opinion is found the following language:

> "In the Caillet Case, the applicant had one hand off and two fingers of the other hand amputated almost to the wrist, which gave him 100 per cent loss of function of one hand and 60 per cent of the other. The evidence showed that his ability to do any work substantially remunerative was so negligible as to approach the vanishing point. Moreover, the opportunity to secure the very few types of work he could do was nil. Perhaps the language from that case above quoted is a little too inclusive. It would fit the person who had one leg or an arm off. A workman who had done manual labor who lost an arm or leg could not 'perform the work of the general character that he was performing when injured,' and yet under a strict following of this rule he would establish a prima facie case. In the first place, the rule was not meant to operate in any case where specific compensation for a loss of a member or loss of function of a member was provided by statute for permanent partial disability. In the second place, even where the loss of function is such as to come between that zone limited on the one side by section 42-1-63, R. S. 1933, making certain losses, in law, total and permanent disability, and, on the other side by cases which can be said in law involve only partial permanent disabilities (to be determined) by the general paragraph of section 42-1-62, where the commission must fix it in proportion to the fixed compensation named for definite losses, the old rule applies that we will not disturb the commission's judgment in such case unless it is arbitrary."

We are aware of the provision of Section 42-1-79

that the Industrial Commission's findings and conclusions on factual questions are conclusive. But the Supreme Court on many occasions has held that this rule must be modified to the extent that the Industrial Commission's findings and orders must not be arbitrary or capricious. If they are arbitrary or capricious, they will not be sustained. The Court has also gone further and held that the Industrial Commission's findings are arbitrary and capricious if they are contrary to the undisputed evidence in the case. A few such cases are:

Kavalinakis vs. Ind. Comm., 67 Utah 174, 246 Pac. 698.
Harness vs. Ind. Comm., 81 Utah 276, 17 Pac. (2nd) 277.
Norris vs. Ind. Comm., 90 Utah 256, 61 Pac. (2nd) 413.
Tintic Standard Mng. Co. vs. Ind. Comm., 100 Utah 96, 110 Pac. (2nd) 367.

We maintain that the Industrial Commission's findings that Mr. James is permanently and totally disabled is contrary to the undisputed evidence in the record and is, therefore, arbitrary.

Mr. James testified that after his accident on November 6, 1939, at Calder Brothers Creamery he was completely disabled for one year and a half, but later he did recover from his injuries to a certain extent (Tr. 4, 5, & 6). We briefly quote his testimony, (Tr. 5):

Q. Do you figure you are totally disabled?
A. I have practically lost the use of my right

arm at this shoulder; I can't use it. When a man has one leg and one arm gone, he is totally disabled.

Q. Is it your opinion that you are totally disabled?

A. I can still make a living if I have to, someway or the other. I think I am still entitled to some consideration.

Q. We are trying to find out what your present disability is, and I asked you whether in your opinion you are totally disabled.

A. Well, no, I would not say so. They figure if a fellow is totally disabled he must be flat on his back.

The most disabling result of his 1939 accident appears to be in his right arm and hand (Tr. 5, 7, 8 & 9). With the loss of his leg from his boyhood accident, there is no doubt about him being considerably handicapped in his work. But the fact remains that he has been continuously employed for a period of three years prior to the Commission's hearing of October 7, 1948, receiving a wage of $160.00 per month, which is almost twice the amount of the wage he was being paid by Calder Brothers Creamery at the time of his 1939 accident. (Tr. 11, 12, 15 & 16.) Mr. James does janitor work, takes tickets at the theatre and does general work around the auto court, such as watering lawns, etc.

The fact that Mr. James' present employer, Mr. Feltche, has been acquainted with him since they were boys together, was stated by the Industrial Commission to be the main reason why Mr. Feltche gave him his

present job. The Commission therefore concluded that Mr. James was permanently and totally disabled, regardless of his present employment.

It is not of any particular importance how or why Mr. James procured his present job. The thing which is of importance is whether or not he is able to work. In other words, if he is satisfactorily performing the duties of the job which he has held for the past three years, clearly he is not "permanently and totally disabled." No doubt, friendship prompts many employers to give a friend or acquaintance a job, whether they are disabled or not. According to the undisputed testimony in the case, Mr. James is certainly not a charity case. Mr. Feltche is receiving satisfactory service for the money which he is paying Mr. James as his employee, and he so testified at the hearing. (Tr. 16.)

In the Industrial Commission's decision of November 4, 1948, and also in its amended decision of November 16, 1948, the Commission stated "that it is doubtful whether the applicant could find any employment with his present disabilities if he were to lose his present job." We do not feel that the Industrial Commission's doubts and fears as to what could happen to Mr. James in the future should properly be included in its findings in the present status of this case. Mr. James is now gainfully employed and has been so employed for three years. There was no evidence in the record that he was not going to remain continuously employed doing the same work for his present employer for an indefinite

time in the future. If at any time in the future Mr. James' condition changes with respect to his ability to perform the work he is now doing, or with respect to his ability to procure or perform any other work which he might attempt to obtain and perform, then under the Industrial Commission's continuing jurisdiction the case might properly be reopened to determine what his disabilities at that time might be, and what compensation he might at that time be entitled to receive, and whether he should receive such compensation from the State Insurance Fund or from the Combined Injury Benefit Fund.

The original decision issued by the Industrial Commission on November 4, 1948, after a preliminary recital as to how the case came on for hearing, contained the following findings, conclusion and orders:

FINDINGS

> "After hearing the testimony in the case and reviewing the same as set forth in the transcript, and other documentary evidence received and made a part of the record, the Commission finds that the applicant sustained an injury by accident arising out of or in the course of his employment on the 6th day of November, 1939; that as a result thereof he suffered certain disabilities, and on June 6, 1941, the Industrial Commission found the applicant to be 100% permanently disabled, and recommended that compensation be paid to the applicant for the remainder of his life; the State Insurance Fund has since been making

regular compensation payments to the applicant on this basis; the Industrial Commission now finds that the applicant is still permanently and totally disabled because of the injuries received on November 6, 1939, i.e., partial loss of hearing, partial loss of use of both of his hands, partial loss of vision and stiffness in his shoulder and neck and bad scars on his face in addition to the loss of his left leg near the hip due to a former injury; that his present employment is due very largely to the life long friendship that has existed between the applicant and his present employer; that it is doubtful whether the applicant could find employment with his present disabilities if he were to lose his present job.

The Commission further finds that the applicant suffered an injury when he was fifteen years of age, causing him to lose his left leg about five inches below the hip.

In view of the fact that the applicant sustained these two disabling injuries, and under the provision of Section 42-1-65, Utah Workmen's Compensation Act, the Industrial Commission concludes that the applicant Charles M. James is entitled to the benefits from the Combined Injury Benefit Fund for the rest of his life, said compensation to begin October 8, 1948; that he should be paid the sum of $8.79 per week from the Combined Injury Benefit Fund during the remainder of his life.

IT IS THEREFORE ORDERED that The State Insurance Fund continue to pay compensation to the applicant as heretofore paid.

WHEREFORE, IT IS ORDERED that the Secretary of the Industrial Commission place the name of Charles M. James upon the list of permanent totals who are entitled to participate in

> the Employees' Combined Injury Benefit Fund, and that commencing as of October 8, 1948, benefits be paid Charles M. James at the rate of $8.79 per week, during the remainder of his life."

In the Commission's Amended Decision of November 16, 1948, the same findings were made, but the conclusions and orders eliminated any reference to the Combined Injury Benefit Fund, without changing the parts of the November 4th decision relating to the State Insurance Fund, as follows:

> "In view of the fact that the applicant sustained these two disabling injuries, and is now totally and permanently disabled, the Industrial Commission concludes that the applicant Charles M. James is entitled to the benefits under the Workmen's Compensation Act.
>
> IT IS THEREFORE ORDERED that The State Insurance Fund continue to pay compensation in the amount of $8.79 per week to the applicant as heretofore paid."

Both the original decision and the amended decision enumerate the various disabling injuries which Mr. James now has, among them being the loss of his left leg which occurred when he was fifteen years of age. The Commission concluded in both the original decision and in the amended decision that Mr. James is now totally and permanently disabled as the result of the injuries he received in both the accident of 1939 and the accident when he was fifteen years of age. *In neither of its decisions did the Commission make a finding or conclusion as to what is the extent of the applicant's*

disability resulting from the injuries he received in 1939 *alone.* It is illegal and erroneous for the Industrial Commission to make a finding or conclusion that Mr. James is permanently and totally disabled by reason of the injuries received in both of the accidents and then order the State Insurance Fund to make payments to him for the rest of his life because he is permanently and totally disabled by reason of the injuries received in both accidents. In other words, the Industrial Commission can not award compensation to an injured employee upon the basis of permanent total disability, unless the permanent total disability is the result of the accidental injuries sustained by the employee in the service of the employer against whom the case is being made.

If the injured employee, Mr. James, could be classified as permanently and totally disabled, (regardless of the fact that he is now gainfully employed), as the result of the injuries received in both his 1939 accident and in his boyhood accident, he would be entitled to payment for the rest of his life from the Combined Injury Benefit Fund under the provisions of Section 42-1-65; but he would not be entitled to any further payment from the State Insurance Fund.

POINT 2

THE INDUSTRIAL COMMISSION'S DECISION AND ORDER OF NOVEMBER 4, 1948, WAS A FINAL ORDER, WHICH WE ARE ENTITLED TO HAVE REVIEWED BY THE SUREME COURT IN THIS PROCEEDING.

POINT 3

THE INDUSTRIAL COMMISSION DID NOT HAVE JURISDICTION TO MAKE ITS AMENDED DECISION OF NOVEMBER 16, 1948; THEREFORE THAT AMENDED DECISION WAS A NULLITY.

Both of these points relate to the Commission's procedure: so we shall discuss them together.

Section 42-1-72 of the Workmen's Compensation Act provides:

> The powers and jurisdiction of the commission over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings, or orders with respect thereto, as in its opinion may be justified.

In the case of *Standard Coal Company vs. Ind. Comm.*, 91 Utah 549, 65 Pac. (2nd) 640, the Utah Supreme Court quoted this section and then made the following observation at the bottom of page 551:

> "This court, however, has heretofore read into the foregoing section the limitation that the commission may not resume jurisdiction of a case regularly determined without some change or new development in the injury complained of and not known to the parties when the former award was made. There are numerous cases supporting that construction of the statute, among them the case of *Spring Canyon Coal Co. vs. Industrial Commission*, 60 Utah 553, 210 Pac. 611; *Salt Lake City vs. Industrial Commission*, 61 Utah 514, 215 Pac. 1047; and other cases that need not be specifcally referred to."

In the case of *McLaren vs. Industrial Commission,* 81 Utah 380, 18 Pac. (2nd) 640, the Court's opinion quotes from the case of *Salt Lake City vs. Industrial Commission,* supra:

> "It may often happen that some material change in the condition of applicant's injury may occur after an award has been made, in which justice to one or the other of the parties litigant might demand a further hearing of the cause. It might be that what was supposed to be a serious or permanent injury for which a large compesation was awarded would prove to be only slight or temporary, in which case the compensation should be substantially modified or abrogated altogether; or it might be that the injury would afterwards prove to be more serious than was supposed when the award was made, in which case the compensation should be increased."

The case of *Utah State Road Commission vs. Industrial Commission,* 109 Utah 553, 168 Pac. (2nd) 319, dealt with a different provision of the Workmen's Compensation Law than is involved in the case at bar, but it contained some discussion relating to the Industrial Commission's powers and procedure, insofar as making changes and new orders in cases which have already been decided. Commencing at the bottom of page 561, the Court's opinion contains the following:

> "In this case the Industrial Commission had a continuing jurisdiction of the subject matter and of the parties, but to materially change the award due process requires previous notice to the parties and a hearing. If we hold valid the procedure

> followed in this case by the commission every administrative tribunal in pursuance of continuing jurisdiction could take action without notice to and hearing of parties involved with the idea that if the parties did not object its order would stand. If, on the other hand, a party did object merely acting on a petition for rehearing would correct the error. Such is not the law—the rights of a party entitled to notice and hearing before decision are not fully protected by notice after decision and opportunity to request a rehearing."

It can be seen from the foregoing citations that the "continuing jurisdiction" provision of the Workmen's Compensation Law does not give the Industrial Commission any legal authority to vacate or annul one of its own decisions and to substitute in its place a new or amended decision without prior notice to the parties concerned, as was done by the Commission in the case at bar. Consequently the Commission's Amended Decision of November 16, 1948, was a nullity. Our second Application for Rehearing dated December 15, 1948, and the Industrial Commission's Order dated December 29, 1948, attempting to grant a rehearing also should be considered as nullities. The latest order which the Commission made in this case, which it had jurisdiction to make, was on November 4, 1948. We are entitled to have that order reviewed by the Supreme Court at this time, inasmuch as we have complied with all jurisdictional requirements of the statute to obtain this review.

In the case of *Callahan vs. Ind. Comm.*, 104 Utah 256, 139 Pac. (2nd) 214, this Court discussed the legal status of a case after the Industrial Commission has once

denied an application for rehearing. Marlow Callahan filed an application with the Commission in which he alleged that he had sustained a hernia in the course of his employment. After a hearing, the Commission denied his claim. On July 13, 1942, the applicant filed an application for a hearing, which was denied by the Commission on July 16, 1942. On August 13, 1942, he filed with the Commission what he termed a "Supplemental Application for Rehearing," and filed with it three affidavits referring to additional evidence which he offered to produce. In ruling upon the effect of this procedure the Supreme Court of Utah, at page 260 of the opinion, stated as follows:

> "This (Supplemental Application) was simply a second petition for rehearing for which there is no authority in law. The statute above quoted is jurisdictional, and the Commission was warranted in disregarding this untimely "Supplemental Application." *Ferguson v. Industrial Commission,* 63 Utah 112, 221 Pac. 1099, wherein it is said:
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> "The first petition for rehearing having been denied on May 8, 1922, the jurisdiction of the Industrial Commission ceased. It was then incumbent upon the applicant to apply to this court within 30 days for a writ of review or to abide by the decision. *Salt Lake City v. Industrial Commission,* 61 Utah 514, 215 Pac. 1047."

It is quite clear that the Supreme Court has jurisdiction to review this case. We feel that after reviewing it the Court should annul the Industrial Commission's

decision of November 4, 1948, insofar as it applied to the State Insurance Fund, and should declare the Commission's amended decision of November 16, 1948, to be a nullity.

Respectfully submitted,

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